No. 92-138

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation, and RUBEN, KAPLAN & ROSEN AND JOHN W. BOYLES, counsel for A-Abart Electric Supply, Incorporated,

Petitioners,

vs.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation and LITTMAN BROTHERS ENERGY SUPPLIES, INC., an Illinois corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT LITTMAN BROS.' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	ii
Statement of the Case	1
A. Summary of the Proceedings Below.	1
B. Statement of Facts	6
Summary of Argument	9
Argument	10
I. Business Electronics Corp. v. Sharp Electronics Corp. Controls the Antitrust Issue Presented by Petitioners . . .	10
II. There is no Reason to Review the Sanctions Imposed on Petitioners	18
Conclusion	22

TABLE OF CITATIONS

Page

Cases Cited:

A-Abart Electric Supply, Inc. v. Emerson Electric Co., 956 F.2d 1399 (7th Cir. 1992) . . 5, 19

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) . . . . . passim

Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979) . . . 20

Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988) . . 14

Romala Corp. v. U.S., 927 F.2d 1219 (Fed. Cir. 1991) . . 20

Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988) . . 19

The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988) . . . 15

Westman Commission Co. v. Hobart Int'l., Inc., 796 F.2d 1216 (10th Cir. 1986) . . 14

Statutes cited:

15 U.S.C. §1 . . . . . 1, 11

Rules cited:

Supreme Court Rule 42.2 22

Rule 38 of the Federal Rules of Appellate Procedure 5, 20

Rule 11 of the Federal Rules of Civil Procedure 3

Rule 37 of the Federal Rules of Civil Procedure 4

Rule 12 of the Local Rules of the United States District Court for the Northern District of Illinois . . . 6

STATEMENT OF THE CASE

A. Summary of the Proceedings Below

On December 23, 1988, petitioner A-Abart Electric Supply, Inc. ("A-Abart") filed a three-count complaint against respondents Emerson Electric Co. ("Emerson") and Littman Bros. Energy Supplies, Inc. ("Littman Bros.").[1] Count I of the complaint alleged that Emerson, a manufacturer of electric ceiling fans, and Littman Bros., a ceiling fan dealer that competes with A-Abart, entered into an agreement whereby Emerson would sell its ceiling fans to Littman Bros. and not to A-Abart. A-Abart asserted that this constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

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[1]Neither Littman Bros. nor Emerson has a parent corporation or subsidiaries, nor is Littman Bros. aware that A-Abart has a parent or subsidiary.

In Count II of its complaint A-Abart alleged that Emerson had breached a purported contract to sell 552 ceiling fans and related accessories to A-Abart. In Count III A-Abart alleged that Littman Bros. had tortiously interfered with A-Abart's existing and prospective economic relationship with Emerson.

A-Abart initiated extensive discovery, none of which was directed toward the issue of market power, a necessary element of any rule of reason analysis. Thereafter, A-Abart moved for summary judgment on Count I of the complaint, predicated on its contention that the alleged agreement between Emerson and Littman Bros. was per se violative of Section 1 of the Sherman Act. Littman and Emerson filed cross-motions for summary judgment as to all counts of the complaint. Neither in its motion nor in response to the cross-motions

did A-Abart argue that a rule of reason analysis applied to Emerson's and Littman's conduct.

On November 30, 1990, the district court issued a Memorandum Opinion and Order denying A-Abart's motion for partial summary judgment and granting Littman's and Emerson's cross-motions for summary judgment. Accordingly, the district court entered a judgment dismissing the action in its entirety with prejudice.

The district court subsequently granted Emerson's and Littman Bros.'s motions for sanctions under Rule 11 of the Federal Rules of Civil Procedure. The district court found that A-Abart had violated Rule 11 by, among other things, failing to cite the Supreme Court's controlling decision in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) in its opening brief. In

addition, the district court noted that once respondents had cited Sharp in their briefs, A-Abart attempted to distinguish it on frivolous grounds, and quoted cases and language from the dissenting opinion in that case as if they were taken from the majority opinion.

A-Abart appealed to the United States Court of Appeals for the Seventh Circuit from both the dismissal of its action and the sanctions imposed on it.[2] As it had before the District Court, A-Abart argued that the respondents' conduct was a per se violation of Section 1 of the Sherman Act.

On February 27, 1992, the Court of Appeals rendered its opinion affirming the decision of the district court in all

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[2]A-Abart did not appeal from sanctions imposed on it under Rule 37(b)(2) of the Federal Rules of Civil Procedure for failing to comply with an order of the district court relating to discovery.

respects. 956 F.2d 1399 The Court of Appeals recognized that Sharp controlled the antitrust issue, Id. at 1403, that the challenged conduct was not subject to the per se rule, Id., and that A-Abart had not argued for the application of the rule of reason standard. Id.

The Court of Appeals assessed the costs of the appeal, including attorneys fees, against A-Abart's counsel, in accordance with Rule 38 of the Federal Rules of Appellate Procedure. In addition to concluding that the arguments advanced by A-Abart on appeal were as frivolous as the claims it had made before the district court, the Court of Appeals sanctioned petitioners because of their misleading citations to Sharp and other decisions.

On April 23, 1992, the Court of Appeals denied petitioners' request for a rehearing.

B. Statement of Facts[3]

Littman and A-Abart both own and operate a series of retail stores in the Chicago area from which they sell electric ceiling fans. Emerson is a manufacturer of ceiling fans.

In 1988, Emerson introduced a new line of ceiling fans to the market. On September 8, 1988, representatives from Emerson met with Littman to present Emerson's new line of fans to Littman.

During their September 8 meeting, Littman asked Emerson which stores were going to be carrying Emerson's new fan line in Chicago. The Emerson representatives informed Littman

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[3]These facts are drawn from the statements of material fact as to which there is no genuine issue which were filed by Littman and Emerson in accordance with Local Rule 12(m) of the United States District Court for the Northern District of Illinois. A-Abart did not file a response to either 12(m) submission, meaning that it admitted all of the facts set out by Littman and Emerson. See Local Rule 12(n) of the United States District Court for the Northern District of Illinois.

that Emerson intended to speak with all of the retailers in the Chicago area before making a decision as to the stores to which it would sell its fans.

At the September 8 meeting, Littman explained to Emerson that it would not be interested in the new Emerson fan line if Emerson sold its products to A-Abart. Littman stated that it did not want to commit its financial resources to introducing Emerson's product to the Chicago market if there was not going to be enough of a market share for it.

A-Abart's first discussion with Emerson did not occur until mid-October, 1988. A-Abart did not fill out a written purchase order for Emerson fans until mid-November, 1988. The order was never filled.

Emerson adopted a limited distribution strategy for its new fan line, intending to restrict the number of dealers in each market

in which it would sell its fans. In Chicago, Emerson concluded that A-Abart and Littman had numerous stores in close proximity of each other, and attracted similar customers. In conformity with its strategy, Emerson decided that it would sell to A-Abart or Littman, but not both. Emerson subsequently made a decision to sell to Littman because Littman had more stores than A-Abart, devoted more money to advertising, would buy more fans, and hence would better enable Emerson to compete with other manufacturers.

Littman also had a ceiling fan store in St. Louis, and sought to carry the new line of Emerson fans in that store. However, because Emerson had already established its distribution network in St. Louis, and consistent with its limited distribution policy, Emerson would not sell fans to Littman for its St. Louis store.

Emerson and Littman met in St. Louis on the afternoon of November 30, 1988, to solidify their relationship. Emerson had made its decision to sell its fans to Littman, and not to A-Abart, prior to this November 30 meeting.

SUMMARY OF ARGUMENT

This Court's decision in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) is dispositive of the antitrust issue involved in this matter.[4] Sharp is not nearly as narrow as A-Abart asserts. Furthermore, even if Sharp were construed narrowly, the facts of the instant case are so similar to those involved in Sharp

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[4]A rule of reason case was never asserted by A-Abart in either the district court or before the Seventh Circuit, nor was any evidence ever developed by A-Abart in support of such an analysis. While A-Abart seeks to raise this issue before this Court, the time has long since passed for it to make such an argument.

that this case presents no novel or unresolved issues which would justify further review.

The imposition of sanctions against petitioners in both the district court and the Court of Appeals was consistent with the applicable rules of civil and appellate procedure. The frivolous nature of A-Abart's claim in light of the decision in Sharp, coupled with petitioners' misleading citations from the dissenting opinion in Sharp, provided more than ample justification for the imposition of sanctions.

ARGUMENT

I

BUSINESS ELECTRONICS CORP. v. SHARP ELECTRONICS CORP. CONTROLS THE ANTITRUST ISSUE PRESENTED BY PETITIONERS

In Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), this Court clearly and unequivocally enunciated the

standard by which a vertical nonprice restraint would be viewed in the context of a claim under Section 1 of the Sherman Act, 15 U.S.C. §1. Seeking to avoid drawing "formalistic distinctions," Id. at 726, this Court concluded that vertical restraints which do not involve setting prices would not be treated as per se illegal.

In an effort to pique this Court's interest in its case, A-Abart argues that Sharp was intended to apply only to the specific facts then before the Court. It refers to the penultimate paragraph of the Court's opinion ["In sum, . . . a vertical restraint trade is not illegal per se unless it includes an agreement on price or price levels"] as mere dictum, even though that paragraph expressly purports to summarize the Court's holding. A-Abart apparently contends that the distinction between a decision to

terminate an existing dealer (Sharp) and the decision to refuse to appoint a dealer (the instant case) -- both at the behest of a competitor/distributor -- is meaningful from a per se standpoint. In fact, however, the distinction is meaningless. There is no language in the Court's opinion that recognizes the potential significance of such a distinction, nor is such a conclusion consistent with the logic of this Court's opinion.

In Sharp, this Court recognized that vertical nonprice restraints can be pro-competitive, by stimulating interbrand competition. Id. at 724-25. Because "per se rules are appropriate only for that conduct which is manifestly anti-competitive," and because vertical nonprice restraints can enhance interbrand competition, this Court refused to mandate that any type of vertical,

nonprice restraint be considered per se illegal. Rather, by requiring a rule of reason analysis for cases involving vertical nonprice restraints, the Court allowed the pro- or anti-competitive nature of each alleged restraint to be considered on its own facts.

Petitioner's narrow interpretation of Sharp is inconsistent both with the cases that led to this Court's consideration of Sharp, and those which have followed. Sharp was expressly intended to resolve a split among the Circuits concerning the "proper dividing line between the rule that vertical price restraints are illegal per se and the rule that vertical nonprice restraints are to be judged under the rule of reason." Id. at 720. In resolving the conflict among the Circuits, this Court did not distinguish between dealer termination cases, such as Sharp, and cases

which involved the refusal of a manufacturer to grant a distributorship.[5] For purposes of antitrust analysis there is no reason to apply a rule of reason analysis to one group of vertical, nonprice restraint cases and a per se analysis to the other, since in both situations the challenged conduct might be pro-competitive.

Those courts of appeal which have considered vertical restraints since this Court's decision in Sharp have not viewed Sharp in the narrow fashion that A-Abart now urges. For example, in Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988), the Court of Appeals found cases involving dealer terminations and those involving

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[5]For instance, Westman Commission Co. v. Hobart Int'l., Inc., 796 F.2d 1216 (10th Cir. 1986), involved a manufacturer's refusal to grant a distributorship to the plaintiff, based upon the urging of one of the manufacturer's other customers.

refusals to deal to be equivalents for purposes of a claim under Section 1 of the Sherman Act. Id. at 1583. Similarly, in The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988), the Court of Appeals drew no distinction between terminations and refusals to deal. Rather, it recognized that Sharp, as well as this Court's antitrust opinions which preceded Sharp, stood for the proposition that "concerted vertical nonprice restraints are scrutinized for illegality under antitrust's rule of reason." Id. at 1154.

Because the antitrust issue involved in the instant case has already been resolved by this Court, there is no purpose to be served by a further review of A-Abart's claims. Furthermore, even if Sharp were viewed narrowly, the facts alleged by A-Abart are so similar to those which the Court considered in

Sharp that further review would not serve to illuminate a more narrow reading of Sharp.

Both cases involve a distributor which stated that it would not carry a manufacturer's product if the manufacturer sold to one of the distributor's competitors. In Sharp, the distributor which imposed the condition on the manufacturer did so as a result of its competitor's price-cutting and free-riding. In the instant case, respondent Littman Bros. was unwilling to spend the funds necessary to introduce Emerson's new product to the marketplace if it was not assured of having a sufficient market share to be able to recoup the expenses it expected to incur. In neither case was there an agreement alleged between a group of distributors. In neither case was there an agreement as to the prices the distributor would charge. In both instances, interbrand competition benefitted

from the efforts of the distributor, enabling the respective manufacturers to better compete with their competitors by retaining the efforts of the stronger distributors.

If anything, the facts in Sharp were more egregious than the instant case. In Sharp, the plaintiff had been an existing distributor. The demands its competitor placed on the manufacturer caused the manufacturer to terminate an existing relationship -- a relationship in which the terminated distributor had made an investment over a period of years. Moreover, the termination of the plaintiff left only one distributor in the region, whereas in the instant case Littman Bros. is but one of a number of Emerson's distributors in the Chicago area. If the conduct in Sharp was not per se illegal, then certainly respondents' conduct here cannot be considered illegal per

se. There is no basis for a further review of this case. The petition for the issuance of a writ of certiorari should be denied.

II

THERE IS NO REASON TO REVIEW THE SANCTIONS IMPOSED ON PETITIONERS

Petitioners' request that this Court review the sanctions imposed on them by both the district court and the Court of Appeals is made without citation to a single case. Remarkably, petitioners also refuse to acknowledge why it was that they were sanctioned.

Before the district court, A-Abart did not even cite Sharp in the brief it filed in support of its motion for partial summary judgment. Instead, among the cases on which A-Abart relied was a 1978 district court decision, which A-Abart did not reveal had been reversed on appeal. After the

respondents had cited Sharp in opposition to A-Abart's motion, A-Abart "quoted cases and language from the dissent in Sharp as if from the majority opinion." Transcript of Proceedings of 2/20/91, attached as Appendix "H" to the Petition for Writ of Certiorari.

Despite having been sanctioned by the district court for either trying to "buffalo the court" or not doing their homework, see Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988), petitioners engaged in equally deplorable conduct before the Court of Appeals. The Seventh Circuit was not only bothered by the fact that the arguments advanced by petitioners were frivolous, but also by petitioners' dishonesty in their citation of authority:

> We have other reasons for awarding damages and costs in this case. A-Abart, in its brief to this court, calls our attention to Cernuto, Inc.

> v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979) and notes that it was cited by the Supreme Court in Business Electronics, 485 U.S. at 742 n.4, 108 S.Ct. at 1529. But A-Abart failed to disclose that this citation was from the dissenting opinion in Business Electronics. Moreover, it is clear that the Supreme Court intended to overrule Cernuto in Business Electronics; the Court cited it as one of the cases representing a split in the circuits that it settled in Business Electronics. Cernuto was quite emphatically on the losing side of that split. Business Electronics, 485 U.S. at 720 n.1, 108 S.Ct. at 1517. Nevertheless, the appellants lead their reply brief with a citation to Cernuto.

956 F.2d at 1407. The fact that petitioners advanced a legal position which was contrary to dispositive authority, coupled with their misconduct in the manner in which they argued the appeal, justified the imposition of sanctions under Rule 38 of the Federal Rules of Appellate Procedure. Romala Corp. v. U.S., 927 F.2d 1219, 1222 (Fed. Cir. 1991).

It is beyond peradventure that both the district court and the Court of Appeals properly exercised their discretion in sanctioning petitioners. This was not an instance where counsel were penalized for advancing a novel issue of law or because they zealously represented their client. Petitioners' continued refusal to admit why they were sanctioned is symptomatic of the type of conduct which caused them to be sanctioned in the first instance.

Unquestionably, A-Abart's counsel were entitled to advocate their clients' position. That license, however, did not allow them to ignore precedent or miscite this Court's opinion. The lower courts' imposition of sanctions was consistent with the parameters of controlling law, and there is no basis for this Court to review those decisions.

CONCLUSION

Based on the foregoing, respondent Littman Bros. Energy Supplies, Inc. respectfully requests that the petition for writ of certiorari filed by A-Abart Electric Supply, Inc. and its attorneys be denied in it entirety. Furthermore, because the petition is so completely frivolous, Littman Bros. requests, in accordance with Supreme Court Rule 42.2, that it be awarded just damages and costs against both A-Abart and its attorneys for having to respond to the petition.

Respectfully submitted,

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